

In the United States  
Circuit Court of Appeals  
For the Ninth Circuit.

3

In the Matter of  
WILLIAM DILLER,

Bankrupt.

WILLIAM DILLER,

Appellant,

vs.

MICHAEL SHOEMAKER, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation, and CALIFORNIA TRUST COMPANY, a corporation,

Appellees.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

FILED

APR 9 - 1936

PAUL P. O'BRIEN,



In the United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

In the Matter of

WILLIAM DILLER,

Bankrupt.

---

WILLIAM DILLER,

Appellant,

vs.

MICHAEL SHOEMAKER, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation, and CALIFORNIA TRUST COMPANY, a corporation,

Appellees.

---

Transcript of Record.

---

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

---



## INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	PAGE
Adjudication and Order of Reference.....	7
Affidavit of Service by Mail of Citation.....	3
Affidavit of Service by Mail of Praecipe.....	57
Agreed Statement of Case.....	6
Assignment of Errors in the United States District Court .....	38
Assignment of Errors in the United States Circuit Court .....	49
Bond for Costs on Appeal.....	43
Citation in the District Court of the United States.....	2
Citation in the United States Circuit Court.....	5
Clerk's Certificate .....	59
Decision .....	23
John Hancock Mutual Life Insurance Company's Deed of Trust .....	14
Judgment of Dismissal.....	31
Names and Addresses of Solicitors.....	1
Order Allowing Appeal in the United States District Court .....	42

Order Allowing Appeal in the United States Circuit Court .....	53
Petition for Allowance of Appeal in the District Court of the United States.....	35
Petition for Allowance of Appeal in the United States Circuit Court.....	46
Petition of John Hancock Mutual Life Insurance Company and California Trust Company.....	18
Petition of John Hancock Mutual Life Insurance Company and California Trust Company.....	19
Praecipe .....	56
Shoemaker Deed of Trust.....	11
Stipulation re Preparation of Transcript.....	54

Names and Addresses of Solicitors.

For Appellant:

WILLCOX & JUDSON, Esqs.,

OREGON SMITH, Esq.,

433 South Spring Street,

Los Angeles, California.

For Appellee Michael Shoemaker:

ROBERT MACK LIGHT, Esq.,

440 Court Street, San Bernardino, California.

For Appellees John Hancock Mutual Life Insurance Company and California Trust Company:

BAUER, MACDONALD, SCHULTHEIS &

PETTIT, Esqs.,

JOHN L. ROWLAND, Esq.,

621 South Spring Street,

Los Angeles, California.

## UNITED STATES OF AMERICA, ss.

To Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 9th day of February, A. D. 1936, pursuant to an order allowing appeal of record in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain proceeding entitled "In the Matter of the Estate of William Diller, Bankrupt", No. 23967-C, wherein William Diller is appellant and you are appellees to show cause, if any there be, why the orders, and each of them, in the said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Geo. Cosgrave, United States District Judge for the Southern District of California, this 10 day of January, A. D. 1936, and of the Independence of the United States, the one hundred and *sixty*

Geo. Cosgrave

U. S. District Judge for the Southern  
District of California.



(AFFIDAVIT OF SERVICE BY MAIL—1013a  
C. C. P.)

IN THE DISTRICT COURT OF THE UNITED  
STATES IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA,  
CENTRAL DIVISION

In the Matter of the Estate of	}	No. 23967-C
William Diller,		AFFIDAVIT OF
Bankrupt		SERVICE BY MAIL

STATE OF CALIFORNIA }  
COUNTY OF LOS ANGELES } ss.

Dorothy Macey, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is: 400 Title Insurance Bldg 433 S. Spring St., Los Angeles, California; that on the 16th day of January, 1936, affiant served the within Citation and Order allowing appeal on Michael Shoemaker in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Michael Shoemaker at the office/residence address of said attorney as follows: (Here quote from envelope name and address of addressee.) "Mr. Robert Mack Light, Attorney-at-Law 440 Court Street San Bernardino, California"; and by then sealing said envelope and depositing the same, with

postage thereon fully prepaid, in the United States Post Office at Los Angeles California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

Dorothy Macey

Subscribed and sworn to before me this 16th day of January, 1936

[Seal]

George A. Judson

Notary Public in and for the County of  
Los Angeles, State of California.

[Endorsed]: Received copy of the within Citation and of order allowing appeal this 16th day of January, 1936. Bauer, Macdonald Schultheis & Pettit by John L. Rowland attorneys for John Hancock Mutual Life Insurance Company and California Trust Company. Filed R. S. Zimmerman, Clerk at 27 min. past 4 o'clock Jan. 17, 1936 P.M. By L. Wayne Thomas, Deputy Clerk.

IN THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT.

IN THE MATTER OF : NO. 8092  
WILLIAM DILLER, : CITATION  
Bankrupt. :

UNITED STATES OF AMERICA, SS.

The President of the United States of America,  
TO Michael Shoemaker, John Hancock Mutual Life In-  
surance Company, a corporation, and California  
Trust Company, a corporation:

GREETINGS:

YOU ARE HEREBY CITED AND ADMONISHED  
to be and appear at the United States Circuit Court of  
Appeals for the Ninth Circuit, to be held at the City of  
San Francisco, in the State of California, within thirty  
(30) days from the date hereof, pursuant to an order  
allowing appeal of record in the Clerk's Office of the  
United States Circuit Court of Appeals for the Ninth  
Circuit, wherein William Diller is appellant and you are  
appellees, to show cause, if any there be, why the orders  
rendered against said appellant, as in said order allowing  
appeal mentioned, should not be corrected and speedy  
justice should not be done to the parties in that behalf.

WITNESS the Hon. Curtis D. Wilbur, Senior United  
States Circuit Judge for the Ninth Circuit, this 15th day  
of January, 1936.

Curtis D. Wilbur  
Judge of the United States Circuit Court of  
Appeals, Ninth Circuit.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 11  
o'clock Mar 30 1936 AM By R B Clifton Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED  
STATES IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA,  
CENTRAL DIVISION

-oOo-

IN THE MATTER OF :  
THE ESTATE OF : NO. 23967-C  
WILLIAM DILLER, : AGREED STATEMENT  
OF CASE

Bankrupt. :

-oOo-

On September 14, 1934, William Diller, alleging that he was a farmer, filed his petition in the above entitled court under Section 75, Subsections (a) to (r), of the Bankruptcy Act as amended, and prayed proceedings in accordance therewith. Thereafter his proposal for composition or extension which he made to his creditors was not accepted by them and the Conciliation Commissioner on March 4, 1935, filed a certificate that the composition or extension had failed and recommended that William Diller be adjudicated a bankrupt pursuant to Section 75(s) of the Bankruptcy Laws of the United States. On March 4, 1935, William Diller filed his amended petition to be adjudged a bankrupt pursuant to Section 75(s) of the Bankruptcy Laws of the United States, and on March 4, 1935, he was adjudicated a bankrupt under said Section 75(s) and the order of adjudication was filed. The proceedings were duly referred to D. W. Richards, Referee in Bankruptcy of the above entitled court, by the following order:

DISTRICT COURT OF THE UNITED STATES  
SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

--

IN THE MATTER OF : No. 23,967-C in Bankruptcy  
ADJUDICATION  
WILLIAM DILLER : And Order of Reference  
(Under Section 75-s  
Bankrupt. : Bankruptcy Act)

---

At Los Angeles, on March 4, 1935, before said Court in Bankruptcy, the petition of William Diller, debtor in the above entitled matter, that he be adjudged bankrupt under the terms and provisions of Section 75-s of the Bankruptcy Act, and within the true intent and meaning of the Acts of Congress relating to bankruptcy having been heard and duly considered, the said William Diller is hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to D. W. Richards, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by section 75-s of the Bankruptcy Act and by all said acts of Congress relating to Bankruptcy; and that the said William Diller shall attend before said referee on March 11, 1935, at his office in San Bernardino, California, at 10 o'clock A.M. and shall submit to such

orders as may be made by said referee or by this court relating to said matter in Bankruptcy.

WITNESS, The Honorable Geo. Cosgrave Judge of said court, and the seal thereof, at Los Angeles, in said District, on March 4, 1935.

R. S. ZIMMERMAN,  
Clerk

By Theodore Hocke  
Deputy Clerk

(SEAL)

The proceedings continued before such Referee under said subdivision (s) continuously from and after said 4th day of March, 1935, until it was determined by the Supreme Court of the United States on or about the 27th day of May, 1935, that said subdivision (s) was violative of the Constitution of the United States.

After the United States Supreme Court rendered its judgment in Louisville-Joint Stock Land Bank v. Radford, 295 U. S. 555 (May 27, 1935), which held the Frazier-Lemke Act, i. e., subsection (s) of Section 75, in violation of the Constitution of the United States of America, Michael Shoemaker, on June 3, 1935, filed with the afore-said Referee a motion to dismiss said proceeding upon the ground of the unconstitutionality of said subsection (s) of Section 75, and on the same day, ex parte and without notice to any other party, orally moved such dismissal before such Referee and such Referee on the same day granted such motion so made, but thereafter said William Diller, on June 24, 1935, ex parte and without notice to and without the knowledge of any other party, filed his amended petition praying, first, for a dismissal

of the proceedings insofar as they were affected by the terms and provisions of Subsection (s) of Section 75, and, second, for an extension of time for a period of ninety days within which to attempt to effect a compromise and adjustment of his obligations to his creditors under the terms and provisions of Section 75. Thereafter and on the same day the court duly made and rendered its order dismissing the proceedings insofar as they were affected by the terms and provisions of subsection (s) of Section 75 and granting William Diller an extension of time for a period of ninety days, that is, to and including September 22, 1935, within which to attempt to effect a compromise and adjustment of his obligations to his creditors under the terms and provisions of Section 75.

The debtor failed to effect a composition or extension with his creditors under the provisions of Section 75 (a) to (r) of the Bankruptcy Laws of the United States, and on September 19, 1935, he filed his amended petition to be adjudged a bankrupt under Section 75(s) of the Bankruptcy Laws as amended August 28, 1935, this being the new Frazier-Lemke Act, and on September 21, 1935, said William Diller was adjudicated a bankrupt in accordance with the terms and provisions of Section 75, subsection (s) of the Bankruptcy Laws of the United States, as amended August 28, 1935.

Among the property alleged to be owned by said Diller were two parcels of real property. One parcel was a ranch property consisting of approximately 265 acres, situated in San Bernardino County, California, which property was subject to a first trust deed securing a promissory note upon which the principal unpaid was in the sum of Forty-eight Thousand Dollars (\$48,000.00).

Said first trust deed and said promissory note was owned and held, and is now owned and held by Michael Shoemaker. On November 25, 1935, the principal was overdue and interest was delinquent in the sum of Six Thousand Dollars (\$6,000.00), and nine-tenths (9/10) of the taxes for 1931-1932 were unpaid, the other one-tenth (1/10) thereof having been paid under the ten (10) per cent per year plan authorized by the State of California. This trust deed was in existence on and prior to September 14, 1934, the date upon which Diller filed his original petition.

The other property consisted of a parcel of real property upon which was built a large house, situated in an exclusive residential district in the City of Los Angeles, County of Los Angeles, State of California, fifty (50) miles from the ranch property. William Diller resided in this property with his family at least a portion of the time. This property was also subject to a first trust deed securing a promissory note in the principal sum of Twenty Thousand Dollars (\$20,000.00), with interest at seven (7) per cent per annum. The promissory note was overdue, and no interest thereon had been paid since July 1, 1932. The promissory note and trust deed is now and was at the time and prior to the filing of the debtor's petition, owned and held by John Hancock Mutual Life Insurance Company. California Trust Company is named as trustee in said deed of trust. John Hancock Mutual Life Insurance Company has advanced taxes upon the property for the years commencing 1931-1932, to and including 1933-1934. It also advanced insurance premiums in order to keep the property insured. No payment of interest has been made since July 1, 1932. As of November 25, 1935, delinquent interest and advances made by the creditor amounted to Seven Thousand Four Hundred Thirty-four Dollars and Six Cents (\$7,434.06),



which together with the principal amount of the debt made a total debt of Twenty-seven Thousand Four Hundred Thirty-four Dollars and Six Cents (\$27,434.06). Taxes for the year 1934-1935 have not been paid.

Each of the above described deeds of trust is in the customary California form providing for sale by the trustee upon default in the payment of sums secured thereby at the demand of the owner and holder thereof, but neither of said deeds of trust provides for the appointment of a receiver. Each of said deeds of trust had been executed prior to the institution of any of the proceedings described herein.

Among other things, the Shoemaker deed of trust provided as follows:

A. Trustor promises and agrees, during continuance of these Trusts:

1. For the purpose of protecting and preserving the security of this Deed of Trust: (a) to properly care for and keep said property in good condition and repair; (b) not to remove or demolish any building thereon; (c) to complete in good and workmanlike manner any building which may be constructed thereon, and to pay when due all claims for labor performed and materials furnished therefor; (d) to comply with all laws, ordinances and regulations requiring any alterations or improvements to be made thereon; (e) not to commit or permit any waste or deterioration thereof; (f) not to commit, suffer or permit any act to be done in or upon said property in violation of any law or ordinance; (g) to cultivate, irrigate, fertilize, fumigate, prune and/or do any other act or acts, all in a timely and proper manner, which, from the character or use of said property, may be reasonably neces-

sary to protect and preserve said security, the specific enumerations herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire insurance policy shall be credited first, to accrued interest; next, to expenditures hereunder and any remainder upon the principal, and interest shall thereupon cease upon the amount so credited upon principal; provided, however, that at option of Beneficiary, the entire amount so collected or any part thereof may be released to Trustor, without liability upon Trustee for such release.

3. To appear in and defend any action or proceeding purporting to affect the security of the Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary and/or Trustee may appear.

4. To pay before default or delinquency; (a) all taxes, assessments or incumbrances (including any debt secured by Deed of Trust), which appear to be prior liens or charges upon said property or any part thereof, including assessments on appurtenant water stock and any accrued interest, cost or penalty thereon; (b) all costs, fees and expenses of these Trusts, including cost of evidence of title and Trustee's fees in connection with sale, whether completed or not, which amounts shall become due upon delivery to Trustee of Declaration of Default and Demand for Sale as hereinafter provided.

5. To pay within thirty days after expenditure, without demand, all sums expended by Trustee or Beneficiary under the terms hereof, with interest from date of expenditure at the rate of ten per cent per annum.

B. Should Trustor fail or refuse to make any payment or do any act, which he is obligated hereunder to make or do, at the time and in the manner herein provided, then Trustee, and/or Beneficiary, each in his sole discretion, may, without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof;

1. Make or do the same in such manner and to such extent as may be deemed necessary to protect the security of this Deed of Trust, either Trustee or Beneficiary being authorized to enter upon and take possession of said property for such purposes.

2. Commence, appear in or defend any action or proceeding affecting or purporting to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder, whether brought by or against Trustor, Trustee, or Beneficiary; or

3. Pay, purchase, contest or compromise any prior claim, debt, lien, charge or incumbrance which in the judgment of either may affect or appear to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder.

Provided, that neither Trustee nor Beneficiary shall be under any obligation to make any of the payments or do any of the acts above mentioned, but, upon election of either or both so to do, employment of an attorney is authorized and payment of such attorney's fees is hereby secured.

- . . . .

I. This Deed of Trust in all its parts applies to, inures to the benefit of, and binds all parties hereto, their heirs,

legatees, devisees, administrators, executors, successors and assigns.

Among other things, the John Hancock Mutual Life Insurance Company's deed of trust provided as follows:

A. Trustor promises and agrees, during continuance of these Trusts:

1. For the purpose of protecting and preserving the security of this Deed of Trust: (a) to properly care for and keep said property in good condition and repair; (b) not to remove or demolish any building thereon; (c) to complete in good and workmanlike manner any building which may be constructed thereon, and to pay when due all claims for labor performed and materials furnished therefor; (d) to comply with all laws, ordinances and regulations requiring any alterations or improvements to be made thereon; (e) not to commit or permit any waste or deterioration thereof; (f) not to commit, suffer or permit any act to be done in or upon said property in violation of any law or ordinance; (g) to cultivate, irrigate, fertilize, fumigate, prune and/or do any other act or acts, all in a timely and proper manner, which, from the character or use of said property, may be reasonably necessary to protect and preserve said security, the specific enumerations herein not excluding the general.

2. To provide fire and earthquake insurance satisfactory to, and with loss, if any, payable to said Beneficiary, and to have such insurance written by such agent in such insurance companies as the Beneficiary may designate; it being agreed that in the event of a loss, the amount collected under any policy of insurance on said property may, at the option of said Beneficiary, be credited first upon any advances secured hereby, next upon interest due, if any, upon said indebtedness, and the remainder, if any,

upon the principal sum then secured hereby, and interest shall thereupon cease upon the amount so credited upon said principal sum; or, said amount, or any portion thereof, may be released to said Trustor for the purpose of making repairs or improvements upon said property, in which event neither said Trustee nor said Beneficiary shall be obligated to see to the proper application thereof, nor shall the amount so released be deemed a payment on any indebtedness secured hereby.

3. To appear in and defend any action or proceeding purporting to affect the security of this Deed of Trust, the interest of Beneficiary or the rights, powers and duties of Trustee hereunder; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary and/or Trustee may appear.

4. To pay before default or delinquency: (a) all taxes, assessments or incumbrances (including any debt secured by Deed of Trust), which appear to be prior liens or charges upon said property or any part thereof, including assessments on appurtenant water stock, and any accrued interest, cost or penalty thereon; (b) all costs, fees and expenses of these Trusts, including cost of evidence of title and Trustee's fees in connection with sale, whether completed or not, which amounts shall become due upon delivery to Trustee of Declaration of Default and Demand for Sale, as hereinafter provided.

5. To pay within thirty days after expenditure, without demand all sums expended by Trustee or Beneficiary, under the terms hereof, with interest from date of expenditure at the rate of ten per cent per annum.

B. Should Trustor fail or refuse to make any payment or do any act which he is obligated hereunder to make or

do, at the time and in the manner herein provided, then Trustee and/or Beneficiary, each in his sole discretion, may, without notice to or demand upon Trustor, and without releasing Trustor from any obligation hereof:

1. Make or do the same in such manner and to such extent as may be deemed necessary to protect the security of this Deed of Trust, either Trustee or Beneficiary being authorized to enter upon and take possession of said property for such purposes.

2. Commence, appear in or defend any action or proceeding affecting or purporting to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder, whether brought by or against Trustor, Trustee or Beneficiary; or

3. Pay, purchase, contest or compromise any prior claim, debt, lien, charge or incumbrance which in the judgment of either may affect or appear to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder.

Provided, that neither Trustee nor Beneficiary shall be under any obligation to make any of the payments or do any of the acts above mentioned, but, upon election of either or both so to do, employment of an attorney is authorized and payment of such attorney's fees is hereby secured.

.....

I. This Deed of Trust in all its parts, except as herein otherwise provided, applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns.

William Diller's proposal for a composition or extension, made on or about September 18, 1935, offered to

pay the sum of Forty-six Thousand Five Hundred Fifty Dollars (\$46,550.00) in satisfaction of the Michael Shoemaker promissory note and trust deed, and offered to pay the sum of Twenty-one Thousand Six Hundred Ten Dollars (\$21,610.00) in satisfaction of the John Hancock Mutual Life Insurance Company promissory note and trust deed, said sums being the values placed upon the respective properties by appraisers appointed in the proceedings.

On July 24, 1935, Michael Shoemaker filed his petition to dismiss the proceedings, or in the alternative for an order permitting Michael Shoemaker to foreclose the trust deed. Said petition was based upon the following grounds:

(1) That the debtor, having voluntarily terminated proceedings under subdivisions (a) to (r) of Section 75 of the Bankruptcy Act, left the court with no jurisdiction in the premises.

(2) That the proceedings have been and were then being prosecuted in bad faith and without any intent to make a composition, or any expectation of making a composition, but solely for the purpose of hindering, delaying and defrauding said creditor.

(3) That said debtor was not a farmer within the meaning of Section 75.

(4) That the court had no jurisdiction to make the order which it made on June 24, 1935, extending the time for an attempt to effect a composition or extension.

(5) That the relation of debtor and creditor did not exist between Diller and Michael Shoemaker for the reason that said William Diller had not assumed the payment of the promissory note secured by said trust deed held by said Shoemaker.

On July 25, 1935, John Hancock Mutual Life Insurance Company and California Trust Company filed their petition for order to show cause why an order should not be made permitting the sale of real property under deed of trust. Said petition was based upon the following grounds:

(1) That the indebtedness owned by said petitioner John Hancock Mutual Life Insurance Company was not an indebtedness incident to or arising out of the farming or agricultural operations of the debtor; that it was not incident to or necessary for the farming operations of the debtor; that the property situated in the City of Los Angeles did not fall within the terms and provisions of Section 75 of the Bankruptcy Laws of the United States.

(2) That there was no equity in the property over and above the amount of the principal and interest due upon the promissory note.

(3) That said debtor was not a farmer within the meaning of Section 75 of the Bankruptcy Act.

(4) That in bad faith and with the sole and only purpose of attempting to bring the property within the provisions of the Bankruptcy Act, authorizing him to attempt to effect a composition or extension with his creditors, the wife of William Diller had conveyed her interest in said property to Diller one or two days prior to September 14, 1934, the date upon which the debtor had filed his original petition.

The hearing on the order to show cause of John Hancock Mutual Life Insurance Company and upon the petition of Michael Shoemaker was continued until September



5, 1935, upon which date a hearing was held, after which the motion of Michael Shoemaker to dismiss was ordered denied and the application of John Hancock Mutual Life Insurance Company and the motion of Michael Shoemaker for leave to foreclose, were denied without prejudice to their renewal upon the same petitions at the expiration of thirty days. Thereafter, on September 21, 1935, William Diller was adjudicated a bankrupt under Section 75, subsection (s), as amended August 28, 1935.

On November 19, 1935, John Hancock Mutual Life Insurance Company and California Trust Company renewed their petition for order to show cause why an order should not be made permitting the sale of real property under deed of trust upon the following grounds, in addition to those theretofore set forth in their prior petition:

(1) That the proceedings for a composition or extension with his creditors had failed;

(2) That the debtor had no reasonable hope or ability to pay the debt;

(3) That subsection (s) of Section 75 of the Bankruptcy Act as amended August 28, 1935, was in violation of the Constitution of the United States of America.

On or about the same day Michael Shoemaker filed a supplement to petition to dismiss or for leave to foreclose, upon the following grounds, in addition to those set forth in his original petition:

That subsection (s) of Section 75 of the Bankruptcy Laws of the United States as amended August 28, 1935,

was in violation of the Constitution of the United States of America.

Throughout the proceedings hereinbefore set forth William Diller, the debtor, was represented by Messrs. Willcox & Judson and Oregon Smith, Esq.; Michael Shoemaker was represented by Robert Mack Light, Esq.; and John Hancock Mutual Life Insurance Company and California Trust Company were represented by Messrs. Bauer, Macdonald, Schultheis & Pettit and John L. Rowland, Esq.

On November 25, 1935, a hearing was had before the Honorable Geo. Cosgrave, United States District Judge, upon said petitions and motions. Evidence was offered and received, and it appeared that although the debtor, William Diller, had been interested in farming for some time, he was largely interested in commercial enterprises and subdividing, at least up to the time the latter became unprofitable. Evidence was offered and received upon all the issues raised by said motions and petitions. Evidence was also offered and received concerning the condition of the ranching property and concerning the condition of the residence property situated in the City of Los Angeles. It was admitted that the respective debts had not been paid and that the defaults as set forth above existed. It was also admitted that appraisers appointed by the court in these proceedings had appraised the properties at the respective amounts set forth above. Argument of the respective counsel was heard by the court, the cause was submitted, and thereafter on December 13, 1935, the court having elected to place its decision solely upon the issue

of the constitutionality of said subsection (s), an order was entered by the Honorable Geo. Cosgrave dismissing the proceedings upon the ground that subsection (s) of Section 75 of the Bankruptcy Act, as amended August 28, 1935, was in violation of the Constitution of the United States of America, and thereafter on the 4th day of January, 1936, a formal judgment of dismissal of the within proceeding was signed and filed by the Honorable Geo. Cosgrave, United States District Judge for the Southern District of California, Central Division. That an exception was duly made by the bankrupt to the rendition of each of said orders, and was duly noted and granted by said court.

The within is and may be treated as a statement of the within case showing how the questions herein arose and were tried in the United States District Court for the Southern District of California, Central Division, setting forth so much only of the facts alleged and proved herein as is essential to a decision of said questions by the United States Circuit Court of Appeals for the Ninth Circuit, and is made pursuant to Rule 77 of the Rules of Practice for the Courts of Equity of the United States, promulgated by the Supreme Court of the United States. As such, the within statement when filed in the office of the clerk of said United States District Court may be treated as superseding, for the purposes of the within appeal, all parts of the record in the within matter other than the above mentioned orders of said United States District Court made the 13th day of December, 1935, and the 4th day of January, 1936, and, together with said orders,

may be copied and certified to Circuit Court of Appeals as the record on appeal herein.

Dated the 29 day of February, 1936.

WILLCOX & JUDSON

By Oregon Smith  
Attorneys for Bankrupt

Robert Mack Light  
Attorney for Michael Shoemaker

BAUER, MACDONALD, SCHULTHEISS  
& PETTIT

By John L. Rowland

Attorneys for John Hancock Mutual Life Insurance Company and California Trust Company

The preparation and filing of the above as an agreed statement of the within case, superseding, for the purposes of the appeal herein, all parts of the record of the within case other than the above mentioned orders from which said appeal is taken, is hereby approved, and said agreed statement of the case and said orders may and they shall be copied and certified to the Circuit Court of Appeals for the Ninth Circuit as the record on appeal herein.

Dated this 30 day of March, 1936.

Geo. Cosgrave

United States District Judge

[Endorsed]: Filed R. S. Zimmerman, Clerk at 40 min. past 11 o'clock Mar. 30, 1936 A. M. By F. Betz, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 23967-C

DECISION

COSGRAVE, District Judge.

William Diller, stating that he was a farmer, filed his petition on September 14, 1934, under Section 75 of the Bankruptcy Act, and prayed proceedings in accordance therewith.

After various proceedings under Section 75 and 75-s, as existing originally, that need not be described in this memorandum, he has secured adjudication under Section 75-s as it now exists. (Bankruptcy Act, Section 75-s, approved August 28, 1935).

A petition to dismiss the debtor's proceeding, or in the alternative to permit the foreclosure of a trust deed covering the farming property, was filed by Michael Shoemaker, the owner of the trust deed. Another petition to permit the foreclosure of a trust deed on property of the debtor, other than his farming property, has been filed by the John Hancock Mutual Life Insurance Company and a hearing was had and evidence taken in support of the two petitions.

At this hearing it was shown that the debtor lives with his family in an exclusive residence district in the City of Los Angeles, fifty miles from his farm, which is in another county. Although interested in farming for some time, he was largely interested in commercial enterprises, and subdividing, at least up to the time the latter became unprofitable.

The trust deed held by the John Hancock Mutual Life Insurance Company secures a note for the principal sum of \$20,000, with interest at seven per cent per annum, and covers the debtor's residence in the City of Los Angeles. The note is overdue and no interest has been paid since July 1, 1932. The life insurance company has advanced taxes for two years and insurance premiums to keep the property insured, the debtor having made default in such particulars. Taxes for 1934-1935 are delinquent, the company having declined to make such payments. Delinquent interest and taxes amount to \$7434.06. In the proceedings first above referred to the property was appraised at \$21,610.00.

The Michael Shoemaker trust deed secures a note for \$48,000 principal, now overdue, together with \$6000 delinquent interest and a considerable portion of the delinquent taxes for 1931-1932. Subsequent taxes it appears have been paid. It covers the farming land consisting of several hundred acres which was appraised by appraisers under the previous proceedings at \$46,500. Both trust deeds were in existence at the time of the amendment to the Bankruptcy Act.

Petitioners in both cases urge the unconstitutionality of the Act on which the proceedings are based, a question probably pending in every district in the United States, but decided, so far as can be readily determined in the few hereinafter referred to. Due to the great number of cases here where the question is presented an early decision is imperative.

Under the present Act, (Bankruptcy Act, Section 75, sub. s, approved August 28, 1935), the farmer petitions that all of his property be appraised and he be allowed to

retain possession of it under the terms of the Act. It is then appraised at its fair and reasonable market value and (sub. 1) after his unincumbered exemptions are set aside to him the possession, under the supervision and control of the court, of part or all of the remainder of his property remains in him subject to all existing mortgages. Thereafter (sub. 2) for a period of three years all judicial or official proceedings are stayed and the debtor is permitted to retain possession of his property upon payment of a reasonable rental. The court may require payments on the principal, having in mind among other things his financial rehabilitation. The rental is first devoted to the upkeep of and payment of taxes upon the property.

At the end of three years (sub. 3), or during that time, the debtor may pay into the court the amount of the appraisal of the property and thereupon the court shall turn over full possession and title of the property free of incumbrances to the debtor. In the meantime upon the request of any creditor the court must cause a reappraisal of the property to be made and the debtor must pay the reappraised value. It is provided, however, that at the written request of any secured creditor the property shall be sold at public auction.

The Act seems to be somewhat ambiguous as to when this right last mentioned shall be exercised. Included as a qualification of the positive provision that the debtor may at any time during the three years pay the appraised value of the property and take it free of incumbrance, the effect to be given to the clause undoubtedly is that the secured creditor can exercise such right at the time that the debtor proposes to pay the appraised value; this may be during or at the end of the three years. This view

is made more certain by the language of the provision in subdivision 2 that the courts shall stay all proceedings for a period of three years, during which time the debtor is allowed to retain possession of his property.

The Act therefore provides that the property subject to the lien shall be appraised and the debtor given possession of it for a period of three years upon payment of a reasonable rental and all proceedings against him stayed. This rental is applied first to the payment of the taxes and upkeep of the property and the remainder given to the secured creditor. At any time within three years the debtor may pay the appraised value of the property and receive it free of the incumbrance. Whenever this action is proposed the creditor may demand that the property be sold at public auction.

The decision of the United States Supreme Court in *Louisville Joint Stock Land Bank vs. Radford*, 295 U. S. 555, condemns the former Frazier-Lemke Act (Bankruptcy Act, Section 75-s, as existing May 27, 1935) because its effect was to deny to the bank the following specifically described rights.

1. The right to retain the lien until the indebtedness thereby secured is paid.

2. The right to realize upon the security by a judicial public sale.

3. The right to determine when such sale shall be held, subject only to the discretion of the court.

4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the



proceeds of a fair competitive sale or by taking the property itself.

5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

There is nothing in the decision indicating that this enumeration is exclusive of other rights, or any suggestion of relative value among those described.

It may be conceded that under the new Act the lien-holder retains the lien until the indebtedness is paid because he may finally demand a sale at public auction. We might also concede that for the same reason the right numbered two in the opinion of the Supreme Court, being to realize upon the security by a judicial public sale, is also preserved. The new Act, however, distinctly deprives the lien-holder the right numbered three, that is to determine when the sale shall be had, subject only to the discretion of the court. On the contrary this right is postponed for three years or for a shorter time at the pleasure of the debtor and not the lien-holder. The language of the Supreme Court in *Louisville Joint Stock Land Bank vs. Radford*, *supra*, upon this point is plain:

“Equally unfounded is the contention that the mortgagee is not injured by the denial of possession for the five years, since it receives the rental value of the property . . . Radford’s argument ignores the fact that in ordinary bankruptcy proceedings and in equity receiverships,

the court may in its discretion, order an immediate sale and closing of the estate; and it ignores, also, the fundamental difference in purpose between the delay permitted in those proceedings and that prescribed by Congress. When a court of equity allows a receivership to continue, it does so to prevent a sacrifice of the creditor's interest. Under the Act, the purpose of the delay in making a sale and of the prolonged possession accorded the mortgagor is to promote his interests at the expense of the mortgagee." (596.)

A period of redemption of three months is also given which deprives the owner of the trust deed of a property right. Rights created under trust deeds, such as are involved in this case, have long been an established rule of property in California (*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 25 Cal. Jur. 8). On this subject the Circuit Court of Appeals of the Seventh Circuit in an opinion written by Circuit Judge Sparks on November 15, 1935, says:

"We think that in thus extending or tolling the period of redemption for three years beyond that fixed by state statutes, Congress exceeded the powers conferred upon it under the bankruptcy clause of the Constitution."

and further:

"We think there is nothing in the constitutional clause conferring upon Congress the control over bankruptcy (authorizing the passage of bankruptcy laws) which authorizes it to change property rights already created by the states."

-In re Loman, et al ..... Federal Reporter, 2d .....

It might be conceded that the right numbered four is preserved.

Right numbered five, however, is distinctly destroyed. The control of the property during the period of default is given not to the lien-holder but to the debtor, as also are the rents and profits. It is true that the Act provides (sub. 1) that liens shall remain in full force and effect. This fair assurance is forthwith made entirely hollow by the specific provisions above referred to and is without substance.

Conceding the utmost therefore to the new Act, it is plain that the rights numbered three and five in the Supreme Court's opinion are denied the lien-holder under it to the same extent as under the original Act. The lien-holder is deprived of substantive rights without compensation in violation of the Constitution. The Act must therefore be held invalid.

The question has already been considered in three careful and instructive opinions by district courts; by Judges Briggles and Major of the Southern District of Illinois, *In Re Young*, on October 21, 1935, 12 Fed. Supp. 30; by Judge Paul of the Western District of Virginia, *In Re Sherman*, on November 8, 1935; and by Judge Scott of the Northern District of Iowa, on November 28, 1935; although with some doubt a contrary opinion has been expressed by Judge Atwell of the Northern District of Texas, on October 12, 1935, in the *Matter of Slaughter*.

In re Loman, the case above referred to, decided by the Circuit Court of Appeals of the Seventh Circuit, a certificate of sale on mortgage foreclosure had been issued on August 5, 1933, the purchaser being entitled to a deed on August 5, 1934. On July 23, 1934, the petition of the debtor was filed. The district court enjoined the execution and delivery of the deed, but this ruling was reversed by the Circuit Court. While it is true the case is not a parallel of the present case, and it might be urged is authority only where a similar state of facts exists, the reasoning of the court and its conclusion above quoted are entirely applicable.

For the reasons given the bankruptcy proceeding should be dismissed and it is so ordered.

Exception to the debtor.

December 13, 1935.

[Endorsed]: Filed Dec 13, 1935 5 P. M. R. S. Zimmerman, Clerk By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED  
STATES SOUTHERN DISTRICT OF CALI-  
FORNIA, CENTRAL DIVISION.

---

IN THE MATTER OF THE ESTATE )  
OF WILLIAM DILLER, ) No. 23967-C  
Bankrupt. )

JUDGMENT OF DISMISSAL

The petition of Michael Shoemaker to dismiss proceedings or in the alternative for an order permitting him to foreclose his deed of trust, duly came on for hearing before the above entitled Court, the Honorable George Cosgrave, United States District Judge, Judge Presiding, on November 25, 1935. Robert Mack Light, Esq., appeared as attorney for petitioner. At the same date and hour and before the same Court and Judge, the petition of John Hancock Mutual Life Insurance Company and California Trust Company, for an order permitting sale of real property under deed of trust duly came on for hearing. Messrs. Bauer, Macdonald, Schultheis & Pettit and John L. Rowland, Esq., appeared as attorneys for petitioners John Hancock Mutual Life Insurance Company and California Trust Company. Messrs. Willcox & Judson and Oregon Smith, Esq., appeared as attorneys for the bankrupt, William Diller.

The two petitions were heard on said day, evidence both oral and documentary was offered and received in support of said petitions and in opposition thereto, argu-

ment was heard by the Court and said petitions were submitted to the Court for decision. Said petitions were presented upon the ground, among others, that subsection S of Section 75 of the Bankruptcy Laws of the United States as amended by Act of Congress, August 28, 1935, was and is in violation of the Constitution of the United States of America. It appeared to the Court, and the Court so finds, that said Michael Shoemaker is, and throughout the pendency of these proceedings he has been, the owner and holder of a deed of trust upon certain real property standing of record in the name of the above named bankrupt located within the State and Southern District of California securing sundry indebtednesses including unpaid principal in the sum of Forty-eight Thousand Dollars (\$48,000.00) evidenced by a certain promissory note described in said deed of trust; that said John Hancock Mutual Life Insurance Company is, and throughout the pendency of these proceedings it has been, the owner and holder of a deed of trust upon certain real property standing of record in the name of the above named bankrupt located within the State and Southern District of California securing sundry indebtednesses including unpaid principal in the sum of Twenty Thousand Dollars (\$20,000.00), evidenced by a certain promissory note described in said deed of trust; that due notice of the presentation of said petitions and of each of them was given as provided by law, and by the rules of this Court; that said petitions and each of them came on regularly for hearing; that on the 18th day of September,

1935, a proposal for compensation and extension made by said Diller to his creditors was not accepted by them; that thereafter and on or about the 21st day of September, 1935, said William Diller was adjudicated a bankrupt in accordance with the terms and provisions of subsection S of Section 75 of the Bankruptcy Laws of the United States, as amended; and the Court being fully advised in the premises and it appearing to the Court, and the Court so holds, that subsection S of Section 75 of the Bankruptcy Laws of the United States as amended by Act of Congress, August 28, 1935, is in violation of the Constitution of the United States of America and accordingly the relief prayed for in said petitions should be granted and the within proceedings should be dismissed.

NOW, THEREFORE, upon the motion of said Robert Mack Light, Esq., attorney for Michael Shoemaker, and upon the motion of Messrs. Bauer, Macdonald, Schultheis & Pettit, and John L. Rowland, Esq., attorneys for John Hancock Mutual Life Insurance Company and California Trust Company,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

(1) That the above entitled proceedings be and they are hereby dismissed both as proceedings under subsections A to R, inclusive, of Section 75 of the Bankruptcy Laws of the United States of America and as proceedings under subsection S of Section 75 of the Bankruptcy Laws of the United States of America, and in this latter behalf

both as proceedings under the original subsection S of said Section 75, and as proceedings under said subsection S as amended by Act of Congress on the 28th day of August, 1935; and

(2) That the pendency of these proceedings at whatever stage thereof shall not be construed as and shall not constitute a bar or impediment to the effectiveness or effect of any act or step taken by the holder or holders of any note or notes secured by a deed or deeds of trust or mortgage upon any of the property claimed to be a part of the estate of said bankrupt or debtor taken by or on behalf of the holder or holders of any such note or notes in connection with the foreclosure or sale under any such deed of trust or mortgage, and all such steps and acts shall be as fully effective as though the within proceedings had never been instituted.

Done in open Court this 4th day of January, 1936.

GEO. COSGRAVE  
United States District Judge

APPROVED AS TO FORM AS PROVIDED IN  
RULE 44:

WILLCOX & JUDSON  
Attorneys for William Diller.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 27 min.  
past 11 o'clock Jan-4, 1936 A. M. By F Betz, Deputy  
Clerk.



[TITLE OF COURT AND CAUSE.]

No. 23967-C

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable District Court of the United States for the Southern District of California, Central Division, and the Honorable Geo. Cosgrave, Judge thereof:

The undersigned William Diller, the bankrupt herein, conceiving himself aggrieved by a certain order of the United States District Court for the Southern District of California, Central Division, made the 13th day of December, 1935, of which the following is a copy, to-wit:

[Omitted for the sake of brevity, but set forth heretofore in record.]

And conceiving himself aggrieved by a certain other and different order of said United States District Court made the 4th day of January, 1936, of which the following is a copy, to-wit:

[Omitted for the sake of brevity, but set forth heretofore in record.]

does hereby petition for the allowance of an appeal from said orders, and each of them, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that such appeal may be allowed, and that a citation issue as provided by law directed to Michael

Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation, citing and admonishing them, and each of them, to appear before the United States Circuit Court of Appeals for the Ninth Circuit to show cause, if any there be, why the errors in the above mentioned orders should not be corrected and speedy justice should not be done to the parties in that behalf, and that a transcript of the record and evidence of the proceeding in which the above mentioned orders were made be sent, duly authenticated, to said Circuit Court of Appeals pursuant to the rules of said court in such cases made and provided.

Dated this 9th day of January, 1936.

William Diller  
Bankrupt

WILLCOX & JUDSON

By Oregon Smith  
Attorneys for Bankrupt



IN THE DISTRICT COURT OF THE UNITED  
STATES IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA,  
CENTRAL DIVISION

—oOo—

IN THE MATTER OF                   :       No. 23967-C  
  
WILLIAM DILLER,                   :       ASSIGNMENT  
  :       OF ERRORS  
  
Bankrupt.                    :

—oOo—

Comes now William Diller, the bankrupt herein, and in connection with his appeal from an order of the United States District Court for the Southern District of California, Central Division, made and dated the 13th day of December, 1935, complains and says that in the record and proceedings of said court and in said order itself manifest errors have intervened to the prejudice of said bankrupt of which he makes the following assignments, to-wit:

1. The court erred in holding that the existing subsection (s) of Section 75 of the Bankruptcy Act deprives secured creditors of the above named bankrupt, and more particularly Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation, of substantive rights without compensation, in violation of the Constitution of the United States of America, and is therefore invalid.

2. The court erred in holding that said subsection (s) deprives holders of deeds of trust upon real property of said bankrupt, and more particularly the said Michael Shoemaker, John Hancock Mutual Life Insurance Company and California Trust Company, of the right to determine when a sale of such property shall be held after default made by the bankrupt in the payment of obligations secured by said deeds of trust, subject to the discretion of the court; and the court erred in holding that such right is postponed for three years or for a shorter time at the pleasure of the debtor and not the holder of such deeds of trust.

3. The court erred in holding that said subsection (s) deprives holders of deeds of trust upon real property of said bankrupt, and more particularly the said Michael Shoemaker, John Hancock Mutual Life Insurance Company and California Trust Company, of the right, pending such sale and during the period of such default, subject only to the discretion of the court, to have the rents and profits from such real property collected by a receiver for the satisfaction of said obligations, and to control said property.

4. The court erred in holding that the period of redemption allowed by said subsection (s), after the sale of real property of the bankrupt at public auction at the request of a creditor holding a deed of trust thereon, deprives the holder of such deed of trust of a property right.

5. The court erred in ordering the dismissal of the within bankruptcy proceeding.

In connection with the appeal from another order of said United States District Court made and dated the 4th day of January, 1936, rendered as a formal order supplementing the above mentioned order of December 13, 1935, and based upon the same petitions and pleadings as those upon which the above mentioned order of December 13, 1935, was founded, said bankrupt complains and says that in the record and proceedings of said court and in said order itself manifest errors have intervened to the prejudice of said bankrupt of which he makes the following assignments, to-wit:

1. The court erred in decreeing that said subsection (s) was and is in violation of the Constitution of the United States of America, and that accordingly the relief prayed for in said petitions should be granted and the within proceedings should be dismissed.

2. The court erred in decreeing the above entitled proceedings dismissed, both as proceedings under subsections (a) to (r), inclusive, of Section 75 of the Bankruptcy Act and as proceedings under subsection (s) of said Section 75, and both as proceedings under the original subsection (s) of Section 75 and as proceedings under the existing subsection (s) of said section.

3. The court erred in decreeing that the pendency of these proceedings at whatever stage thereof shall not be construed as and shall not constitute a bar or impediment to the effectiveness or effect of any act or step taken by the holder or holders of any note or notes secured by a deed or deeds of trust or mortgage upon any of the prop-

erty claimed to be a part of the estate of said bankrupt, taken by or on behalf of the holder or holders of any such note or notes in connection with the foreclosure or sale under any such deed of trust or mortgage, and that all such steps and acts should be as fully effective as though the within proceedings had never been instituted.

WHEREFORE said William Diller prays that said orders, and each of them, be reversed and the within cause remanded to the United States District Court for the Southern District of California, Central Division, with instructions to reverse said orders, and each of them.

WILLCOX & JUDSON

By Oregon Smith

Attorneys for appellant, William Diller.

[Endorsed]: Received copy of the within document  
Jan 9-1936 Bauer Macdonald Shultheis & Pettit per Mg.  
Filed R. S. Zimmerman, Clerk at 4 min. past 5 o'clock  
Jan-9, 1936 P. M. By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 23967-C

ORDER ALLOWING APPEAL

Upon reading and filing the assignment of errors and petition for allowance of appeal of William Diller, the bankrupt herein, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the orders, and each of them, referred to in said petition and made the 13th day of December, 1935, and the 4th day of January, 1936, by the United States District Court for the Southern District of California, Central Division, shall be and it hereby is allowed, conditioned, however, upon the giving of a cost bond in the sum of \$250.00 within ten days from date hereof.

Dated this 10 day of January, 1936.

Geo. Cosgrave  
United States District Judge

[Endorsed]: Filed R. S. Zimmerman, Clerk at 40 min. past 2 o'clock Jan 10 1936 P. M. By L. Wayne Thomas Deputy Clerk.



[TITLE OF COURT AND CAUSE.]

No. 23967-C

BOND FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, William Diller, as principal, and Willa Buchan and Florence C. Diller, as sureties, do hereby jointly and severally undertake and promise on the part of appellant that said appellant will pay all damages and costs which may be awarded against him on appeal herein, or on a dismissal thereof, to an amount not exceeding the sum of \$250.00, to which sum we hereby acknowledge ourselves bound.

AND, WHEREAS, appellant has filed an appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, the undersigned appellant and sureties, and each of them, submitting themselves to the jurisdiction of said court, do hereby jointly and severally acknowledge themselves bound unto whom it may concern in the sum of \$250.00, to the effect that they will pay all costs and expenses which may be awarded against the appellant in said case by the final decree of said court or upon appeal, and consent that in the event of the default or contumacy of said appellant, execution may issue against them, their goods, lands and chattels, for the amount of this undertaking.

Dated this 17th day of January, 1936.

William Diller

Principal—Appellant

Willa Buchan

Surety

Florence C. Diller

Surety

SOUTHERN DISTRICT OF CALIFORNIA )  
 STATE OF CALIFORNIA ( ss.  
 COUNTY OF LOS ANGELES )

Willa Buchan and Florence C. Diller, being first duly sworn, each for herself deposes and says:

That they, and each of them, are residents, householders and free-holders within the Southern District of California, Central Division, and worth the amount specified in the above and foregoing bond over and above all their just debts and liabilities exclusive of property exempt from execution.

Willa Buchan

Subscribed and sworn to before me this 17th day of January, 1936.

[Seal]

George A. Judson

Notary Public in and for the County of Los Angeles,  
 State of California

Florence C. Diller

Subscribed and sworn to before me this 17th day of January, 1936.

[Seal]

George A. Judson

Notary Public in and for the County of Los Angeles,  
 State of California.

Examined and recommended for approval as provided in Rule 28.

Oregon Smith  
Attorney

I hereby approve the foregoing bond this 20 day of January, 1936.

Geo. Cosgrave  
United States District Judge

SOUTHERN DISTRICT OF CALIFORNIA )  
STATE OF CALIFORNIA ( ss.  
COUNTY OF LOS ANGELES. )

On this 17th day of January, 1936, before me, George A. Judson, a Notary Public in and for said County and State, personally appeared William Diller, Willa Buchan and Florence Diller, known to me to be the persons whose names are subscribed to the within bond for costs on appeal, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

George A. Judson

Notary Public in and for the County of Los Angeles,  
State of California

[Endorsed]: Filed R. S. Zimmerman, Clerk at 50 min. past 9 o'clock Jan. 20, 1936 A. M. By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 8092

PETITION FOR ALLOWANCE OF APPEAL

To the Honorable Circuit Court of Appeals for the Ninth Circuit, and to the Honorable Judges thereof:

The undersigned William Diller, the bankrupt herein, conceiving himself aggrieved by a certain order of the United States District Court for the Southern District of California, Central Division, made the 13th day of December, 1935, of which the following is a copy, to-wit: (omitted for the sake of brevity but set forth elsewhere in full, at pages 23 to 30).

And conceiving himself aggrieved by a certain other and different order of said United States District Court made the 4th day of January, 1936, of which the following is a copy, to-wit: (omitted for the sake of brevity but set forth elsewhere in full, at pages 31 to 34).

does hereby petition for the allowance of an appeal from said orders, and each of them, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that such appeal may be allowed, and that a citation issue as provided by law directed to Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation, citing and admonishing them, and each of them, to appear before the United States Circuit Court of Appeals for the Ninth Circuit to show cause,

if any there be, why the errors in the above mentioned orders should not be corrected and speedy justice should not be done to the parties in that behalf, and that a transcript of the record and evidence of the proceeding in which the above mentioned orders were made be sent, duly authenticated, to said Circuit Court of Appeals pursuant to the rules of said court in such cases made and provided.

Dated this 9th day of January, 1936.

William Diller

WILLIAM DILLER

Bankrupt

WILLCOX & JUDSON

By Oregon Smith

Attorneys for Bankrupt



IN THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT

—oOo—

IN THE MATTER OF : No. 8092  
WILLIAM DILLER, : ASSIGNMENT OF  
Bankrupt. : ERRORS

—oOo—

Comes now William Diller, the bankrupt herein, and in connection with his appeal from an order of the United States District Court for the Southern District of California, Central Division, made and dated the 13th day of December, 1935, complains and says that in the record and proceedings of said court and in said order itself manifest errors have intervened to the prejudice of said bankrupt of which he makes the following assignments, to-wit:

1. The court erred in holding that the existing subsection (s) of Section 75 of the Bankruptcy Act deprives secured creditors of the above named bankrupt, and more particularly Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation, of substantive rights without compensation, in violation of the Constitution of the United States of America, and is therefore invalid.

2. The court erred in holding that said subsection (s) deprives holders of deeds of trust upon real property of

said bankrupt, and more particularly the said Michael Shoemaker, John Hancock Mutual Life Insurance Company and California Trust Company, of the right to determine when a sale of such property shall be held after default made by the bankrupt in the payment of obligations secured by said deeds of trust, subject to the discretion of the court; and the court erred in holding that such right is postponed for three years or for a shorter time at the pleasure of the debtor and not the holder of such deeds of trust.

3. The court erred in holding that said subsection (s) deprives holders of deeds of trust upon real property of said bankrupt, and more particularly the said Michael Shoemaker, John Hancock Mutual Life Insurance Company and California Trust Company, of the right, pending such sale and during the period of such default, subject only to the discretion of the court, to have the rents and profits from such real property collected by a receiver for the satisfaction of said obligations, and to control said property.

4. The court erred in holding that the period of redemption allowed by said subsection (s), after the sale of real property of the bankrupt at public auction at the request of a creditor holding a deed of trust thereon, deprives the holder of such deed of trust of a property right.

5. The court erred in ordering the dismissal of the within bankruptcy proceeding.



In connection with the appeal from another order of said United States District Court made and dated the 4th day of January, 1936, rendered as a formal order supplementing the above mentioned order of December 13, 1935, and based upon the same petitions and pleadings as those upon which the above mentioned order of December 13, 1935, was founded, said bankrupt complains and says that in the record and proceedings of said court and in said order itself manifest errors have intervened to the prejudice of said bankrupt of which he makes the following assignments, to-wit:

1. The court erred in decreeing that said subsection (s) was and is in violation of the Constitution of the United States of America, and that accordingly the relief prayed for in said petitions should be granted and the within proceedings should be dismissed.

2. The court erred in decreeing the above entitled proceedings dismissed, both as proceedings under subsections (a) to (r), inclusive, of Section 75 of the Bankruptcy Act and as proceedings under subsection (s) of said Section 75, and both as proceedings under the original subsection (s) of Section 75 and as proceedings under the existing subsection (s) of said section.

3. The court erred in decreeing that the pendency of these proceedings at whatever stage thereof shall not be construed as and shall not constitute a bar or impediment to the effectiveness or effect of any act or step taken by the holder or holders of any note or notes secured by a deed or deeds of trust or mortgage upon any of the prop-

erty claimed to be a part of the estate of said bankrupt, taken by or on behalf of the holder or holders of any such note or notes in connection with the foreclosure or sale under any such deed of trust or mortgage, and that all such steps and acts should be as fully effective as though the within proceedings had never been instituted.

WHEREFORE said William Diller prays that said orders, and each of them, be reversed and the within cause remanded to the United States District Court for the Southern District of California, Central Division, with instructions to reverse said orders, and each of them.

WILLCOX & JUDSON

By Oregon Smith

Attorneys for appellant,  
William Diller.

(Endorsed) Assignment of Errors. Filed January 10, 1936. Paul P O'Brien, Clerk.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 58 min. past 10 o'clock, Mar 30 1936 A M By R B Clifton Deputy Clerk

At a stated Term, to wit, the October Term, A. D. 1935 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the thirteenth day of January in the year of our Lord One Thousand Nine Hundred and thirty-six.

Present:

The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding,

Honorable FRANCIS A. GARRECHT, Circuit Judge,  
Honorable WILLIAM DENMAN, Circuit Judge.

IN THE MATTER OF THE PETITION  
OF WILLIAM DILLER, BANKRUPT } No. 8092  
FOR ALLOWANCE OF APPEAL. }

#### ORDER ALLOWING APPEAL

Upon consideration of the petition of William Diller, for allowance of appeal herein under section 24b of the Bankruptcy Act, filed January 10, 1936, together with assignments of error thereon, and good cause therefor appearing,

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the District Court of the United States for the Southern District of California, Central Division, made and entered on December 13, 1935, and the order of January 4, 1936, be, and hereby is allowed, conditioned upon the giving of a cost bond in the sum of Two Hundred and Fifty Dollars (\$250.00) with good and sufficient security, within ten days from date.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 58 min.  
past 10 o'clock, Mar 30 1936 A M By R B Clifton  
Deputy Clerk

[TITLE OF COURT AND CAUSE.]

No. 23967-C

STIPULATION RE PREPARATION OF  
TRANSCRIPT.

IT IS HEREBY STIPULATED AND AGREED by and between Robert Mack Light, attorney for Michael Shoemaker, one of the appellees herein, and Bauer, Macdonald, Schultheis & Pettit, attorneys for the John Hancock Mutual Life Insurance Company, a corporation, and the California Trust Company, a corporation, appellees herein, and Willcox & Judson, attorneys for William Diller the above named bankrupt and the appellant herein, that in the preparation of the transcript on appeal herein the clerk of the above court may be permitted, and he is hereby directed to omit captions from the papers contained in said transcript and to substitute in lieu thereof the following:

“Title of Court and Cause”

and

IT IS FURTHER STIPULATED by and between said parties, through their said attorneys of record, that in the petitions for allowance of appeal of said appellant to both the above entitled court and the United States Circuit Court of Appeals for the Ninth Circuit the orders of the above court herein appealed from, made the 13th day of December, 1935, and the 4th day of January, 1936, may

be omitted, and that there may be substituted in lieu thereof the following:

“Omitted but set forth elsewhere in full, at pages ..... and .....”.

Dated this 2nd day of March, 1936.

Robert Mack Light

Attorney for Michael Shoemaker

BAUER, MACDONALD, SCHULTHEIS  
& PETTIT

By John L. Rowland

Attorneys for John Hancock Mutual Life Insurance Company and California Trust Company

WILLCOX & JUDSON

By Oregon Smith

Attorneys for William Diller

[Endorsed]: Filed R. S. Zimmerman, Clerk at 58 min.  
past 10 o'clock Mar 30 1936 A M By R B Clifton  
Deputy Clerk

[TITLE OF COURT AND CAUSE.]

No. 23967-C

PRAECIPE INDICATING PORTIONS OF RECORD TO BE INCORPORATED IN TRANSCRIPT ON APPEAL

To the Clerk of the United States District Court, Southern District of California, Central Division:

Please disregard all former praecipes herein and prepare and certify a transcript on appeal in the above entitled matter, and include therein the following papers and documents:

1. Circuit Court of Appeals citation.
2. District Court citation.
3. Circuit Court of Appeals petition for allowance of appeal.
4. District Court petition for allowance of appeal.
5. Circuit Court of Appeals Assignment of Errors.
6. District Court assignment of Errors.
7. District Court order allowing appeal.
8. Bond for Costs on Appeal.
9. Agreed statement of case.
10. Clerk's certificate to transcript.
11. That certain District Court order made and dated the 13th day of December, 1935, entitled "Decision".
12. That certain District Court judgment made and dated the 4th day of January, 1936, entitled "Judgment of Dismissal".
13. Circuit Court of Appeals Order allowing appeal.

14. This praecipe.

Dated this 30 day of March, 1936.

WILLCOX & JUDSON

By Oregon Smith

Attorneys for Bankrupt.

IN THE DISTRICT COURT OF THE UNITED  
STATES IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA,  
CENTRAL DIVISION

IN THE MATTER OF THE ESTATE OF WIL-  
LIAM DILLER, Bankrupt.

No. 23967-C

AFFIDAVIT OF SERVICE BY MAIL.

STATE OF CALIFORNIA            )  
COUNTY OF LOS ANGELES    ) <sup>ss.</sup>

Dorothy Macey, being first duly sworn, says: that affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is: 400 Title Insurance Bldg. 433 S. Spring Street, Los Angeles, California that on the 30th day of March, 1936, affiant served the within Praecipe indicating portions of record to be incorporated in transcript on appeal on the Michael Shoemaker in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Michael Shoemaker at the office/residence

address of said attorney, as follows: (Here quote from envelope name and address of addressee.) "Mr Robert Mack Light, Attorney-at-Law, 440 Court Street, San Bernardino, California."; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

Dorothy Macey

Subscribed and sworn to before me this 30th day of March, 1936.

[Seal]

George A. Judson

Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Received copy of the within Praeceptum this 30th day, of March, 1936 Bauer, Macdonald, Schultheis & Pettit By John L. Rowland Attorneys for John Hancock Mutual Life Insurance Company and California Trust Company. Filed R. S. Zimmerman, Clerk at 33 min. past 4 o'clock Mar 30, 1936 P. M. By R. B. Clifton Deputy Clerk.



[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 58 pages, numbered from 1 to 58 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation in the District Court of the United States; citation in United States Circuit Court; agreed statement of the case; decision dated December 13, 1935; judgment of dismissal; petition for appeal; assignment of errors; order allowing appeal; bond for costs in the District Court of the United States; petition for appeal; assignment of errors; order allowing appeal in the United States Circuit Court; stipulation re preparation of transcript, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$                      and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of April, in the year of Our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,  
Clerk of the District Court of the  
United States of America, in  
and for the Southern District  
of California.

By

Deputy.